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IN THE

Supreme Court of the United States

October Term, 1956
No. 243

GEORGE E. SHIBLEY,

Petitioner,

vs.

UNITED STATES OF AMERICA.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

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No.....

GEORGE E. SHIBLEY,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit.

The petitioner, George E. Shibley, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above entitled case on March 19, 1956.

Opinion Below.

The opinion of the court below (App. A) has not yet been officially reported.

Jurisdiction.

The judgment of the Court of Appeals (App. B) was entered on March 19, 1956, and a timely petition for rehearing was denied on May 9, 1956. The time to file this petition for a writ of certiorari was extended to July 7, 1956, by order of Mr. Justice Douglas dated May 28, 1956. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether, contrary to the decision of this Court in *Morrissette v. United States,* 342 U. S. 246 and in conflict with the decisions of other courts of appeal, the courts below erroneously construed 18 U. S. C. 641 and 371 as well as the Uniform Code of Military Justice by instructing the jury as a matter of law that petitioner, civilian counsel for a member of the armed forces, had a motive and reason for arranging to purloin an office copy of a transcript of proceedings of a Marine Corps Court of Inquiry convened to investigate charges made by petitioner against certain Marine Corps officers, and by refusing to permit petitioner to prove by independent evidence that he had no such reason or motive for the commission of the offenses, contrary to the requirements of fair administration of criminal justice in the federal courts and the due process provisions of the Constitution.

2. Whether, upon the uncontradicted showing that prosecuting officials deliberately suppressed evidence favorable to the petitioner, and the production by petitioner of the evidence completely exculpating him from the offenses charged and demonstrating that the charges against petitioner were maliciously contrived, the courts below erroneously denied petitioner's motion for a new trial contrary to the interests of justice, the Federal Rules of Criminal Procedure and the due process provision of the Constitution.

3. Whether, measured by constitutional and legal standards of proof applicable to the circumstances herein,

there was any competent and substantial evidence tending to support the verdict against petitioner and the judgment of conviction hereon.

4. Whether, under 18 U. S. C. 371, the sentence of three years imposed upon petitioner under the conspiracy count of the indictment was illegal and beyond the jurisdiction of the trial court where the proof allegedly showed only a conspiracy to commit misdemeanor offenses punishable only by a maximum term of one year imprisonment.

5. Whether 18 U. S. C. 13, the Assimilative Crimes Statute, inherently and as construed and applied herein, violates the due process provision of the Fifth Amendment, creates an unequal application of the criminal laws in the different states and territories and invades the reserved powers of the states in violation of the Tenth Amendment to the Constitution of the United States.

6. Whether, the conviction of petitioner principally upon the testimony of an adjudicated insane witness, the failure of the court to instruct the jury as to the weight and credibility to be given the testimony of an adjudicated insane witness, the coercion of the jury's verdict and the exclusion by the trial court of testimony as to the reputation of an adjudicated insane witness, substantially affected petitioner's right to a fair trial and deprived petitioner of his liberty without due process of law.

Constitutional Provisions and Statutes Involved.

The pertinent constitutional provisions and statutes involved are set forth in Appendix C.

Statement of the Case.

Introduction.

The case herein raises questions both fundamental and far-reaching in federal criminal law; in the administration of the Uniform Code of Military Justice and the law military; and in the jurisdiction of military courts and authorities over civilian counsel appearing on behalf of persons in the armed forces. The case was described by the trial court as "unusual" [Pr. R. 49],[1] and by the prosecutor as "bizarre" [R. 407]. It was made so by the circumstances out of which the case arose, the nature of the charge and the character of the trial below. In a land which sets civilized standards governing police, military and court proceedings this case presents a shocking example of violation of due process guaranteed by the Fifth Amendment to the United States Constitution.

The petitioner, a member of the Bar of the State of California for two decades, was retained to represent a Marine facing charges of violation of certain military regulations. Petitioner represented his client vigorously and efficiently. In the course of his successful efforts to acquit his client, petitioner, as civilian counsel, made charges of malfeasance against the military officers at the Marine Base where the proceedings were taking place. He incurred, as the record shows, the displeasure and enmity of commanding officials who would not brook such conduct by an independent civilian counsel.

The officer against whom petitioner, on behalf of his client, had leveled charges convened a military court of inquiry, composed of his own subordinate officers, and compelled petitioner to appear before said military body.

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[1]References designated "R" are to the Reporter's transcript of proceedings. References "Pr. R." are to the Reporter's transcript of the preliminary proceedings. References to the Clerk's transcript of record below are "C. Tr."

The hearings were secret and petitioner was denied the right to counsel. During the proceedings, petitioner was brought forcibly from his law offices to the military base by armed Marines. He was subjected to an harassing interrogation which lasted five days, the sole object of the inquiry being to compel petitioner to retract the charges made against the military officers or to reveal the sources of his information. He declined as an attorney to do either.

Proceedings were then initiated by the military officers seeking to punish petitioner in the federal courts for contempt in refusing to answer the inquiries of the court of inquiry at the military base. This effort proved abortive when a jury acquitted the petitioner after trial.

In the meantime, the military allegedly discovered that an office copy of the transcript of the proceedings of the said court of inquiry was missing. It was then charged that petitioner had arranged to have such copy purloined for his own use and benefit, and proceedings were again initiated in the federal courts charging petitioner, among other things, with "receiving" stolen property and conspiring to so unlawfully "receive." Petitioner, as will be shown hereinafter, never did receive the copy. It was sent on to news columnist Drew Pearson in Washington, D. C. by the chief prosecution witness who admittedly took it and mailed it to Pearson with the help of a former "leg man" for Pearson with whom he was then living. Photographs of the document were sent to petitioner.

The case made against petitioner rested essentially on the testimony of one witness, a mental incompetent and degenerate who admitted that he had taken the copy of the transcript with the knowledge of a Marine corporal

on the base. The witness did not implicate petitioner until about six months after his own conduct had been discovered by the military. He received a suspended sentence after the trial. No proceedings of any kind were instituted by the military or civilian authorities against the corporal. The office copy of the transcript of the proceedings (a seventh copy) was found by the jury to be worth less than $100. Petitioner was sentenced to three years imprisonment for allegedly arranging without authority to obtain the said copy.

At the trial, petitioner denied that he had any reason or motive for appropriating the copy of the transcript. All efforts to prove by independent evidence that under the law military and the civil law petitioner knew that he was entitled to a copy of the transcript without charge were frustrated by the trial court's rulings, and the instructions of the court virtually directed the jury to find that petitioner had a reason and motive for committing the alleged offense. The sufficiency of the evidence was sustained despite the fact that it rested upon the single testimony of an incompetent witness.

After trial, petitioner and his counsel for the first time discovered that the prosecution had suppressed the evidence of a witness who had actually been with the prosecution witness at the time the latter took the office copy of the transcript, and who had herself secreted the transcript for the benefit of the prosecution witness. This newly discovered and detailed testimony completely exculpated petitioner; yet the witness had actually been secreted by the prosecution during the trial and her testimony withheld from petitioner and his counsel. A motion for a new trial was summarily denied.

We detail these matters in the statement which follows.

The Retention of Petitioner as Counsel.

The petitioner was retained in July, 1952, to represent a Sergeant Bennette in pre-trial investigation proceedings at the El Toro Marine Air Station located in Orange County, California [C. Tr. 19]. See 50 U. S. C. 603(b). The charge generally was that the marine had violated a provision of the Marine Corps Manual (Vol. 1, par. 15250) by engaging in the business of transporting for hire certain personnel and wrongfully interfering with the regular employment of local civilians in their trades.

In the representation of his client at the military base, petitioner made on behalf of his client serious charges of derelictions in office and disregard of the provisions of the Uniform Code of Military Justice by the Commanding General and his immediate subordinates at the Marine Air Station [C. Tr. 19]. A communication in writing setting forth these charges was sent by petitioner on behalf of his client to the Commandant of the United States Marine Corps at Washington, D. C. [C. Tr. 19]. The record does not indicate that these charges were ever denied, or the final disposition thereon. It appears that a request from Washington was thereafter made upon the local Commanding General at the Marine Base for a full report. Instead of making such a report, the said Commanding General convened a military Court of Inquiry (See, 50 U. S. C. 731) and on November 25, 1952, while petitioner was appearing on behalf of his client in

court-martial proceedings,[2] petitioner was served with a subpoena requiring his appearance as a witness at the Court of Inquiry on December 4, 1952 [C. Tr. 21].

Proceedings of the Court of Inquiry.

The proceedings of the Court of Inquiry appear to have been conducted in sharp variance with the provisions of the Uniform Code of Military Justice and the regulations thereunder. The object of the proceedings appears largely to have been a self-generated attempt to exculpate the military officials involved and to obtain a retraction from civilian counsel of the charges he had lodged against the officials on behalf of his client [C. Tr. 21].

The subject matter of the inquiry was, as aforesaid, the charges made by petitioner on behalf of his client against the commanding officer at the Marine Base and his subordinate officers. It was this commanding officer who convened the Court of Inquiry, appointing three subordinate officers as members of the "Court," all laymen [C. Tr. 21]. The same convening authority appointed counsel for the "court." 50 U. S. C. 731(b). A

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[2]Following the pre-trial investigation, court-martial proceedings were instituted against Sergeant Bennette, who was represented therein by petitioner. Bennette was subsequently found guilty [C. Tr. 20]. Petitioner, in association with other counsel, represented Bennette on appeal [R. 290]. On March 18, 1953, a Navy Board of Review unanimously reversed the findings of guilt and invalidated the sentence, which had been severe. The Board found that the Marine Corps regulation was a limitation solely on commanding officers and imposed no prohibition or limitation on the conduct of individual enlisted men. *United States v. Bennette*, 9 Court-Martial Reports (CMR) 600. The Judge Advocate General of the Navy refused to certify the case to the Court of Military Appeals [C. Tr. 23]. See, *Digest of Opinions, The Judge Advocates General of the Armed Forces*, Vol. 3, p. 96 (July-September, 1953).

Lieutenant-Colonel who had been one of those accused by the client and the petitioner of wrongdoing was "designated as a party" to the action. He was thus entitled to be given due notice, to be present, "to be represented by counsel" [C. Tr. 24], to cross-examine witnesses, and to introduce evidence. 50 U. S. C. 731(c).

Sergeant Bennette also requested that he be designated as a party [C. Tr. 21], but this request was denied.[3] Thus, Sergeant Bennette, unlike the Lieutenant-Colonel, was deprived of the right to be represented by petitioner as his counsel, to be present at the proceedings, to cross-examine witnesses or to introduce evidence. Instead, his civilian counsel was subpoenaed as a witness in these military court proceedings on the military base [C. Tr. 21-22].

The proceedings before the Court of Inquiry were *in camera*, and petitioner himself was denied the right to counsel [C. Tr. 22].[4] As petitioner swore in support of a preliminary motion prior to trial, he "was treated in all respects like a prisoner" before the Court of Inquiry [C. Tr. 22]. The Court was called into session on December 3, 1952 [R. 219]. Petitioner appeared the next day [R.

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[3]The Uniform Code of Military Justice provides: "Any person subject to this chapter or employed by the Department of Defense who has a direct interest in the subject of inquiry shall have the right to be designated as a party upon request to the court." 50 U. S. C. 731(c).

[4]Winthrop states that the present day court of inquiry cannot be compared to a grand jury. ". . . but, as the party whose conduct is under investigation may be present with counsel, and be heard in his defense, at its sessions, and its proceedings may be and generally are public, the analogy indicated is by no means complete." *Military Law and Precedents* (1920), p. 522. See also, p. 528, where the author concludes: ". . . with us, courts of inquiry, unless otherwise instructed in Orders, are in general held as open courts."

220]. He was interrogated for three days, December 4, 5 and 6, the constant object being to make him substantiate the charges he had made against the military officials, or to retract them [C. Tr. 21-22]. He declined to answer some of the inquiries, asserting that the court had been illegally and invalidly convened [C. Tr. 21], that the officers of the court were not impartial, that the inquiries sought information furnished in confidence by a client to his attorney, that in the setting of the inquiry the petitioner by his answers might subject himself to the dangers of a prosecution, however baseless, and upon other related grounds.[5]

Believing himself excused from further attendance at the inquiry, petitioner made no further appearance after December 6 [C. Tr. 22]. The court did not sit on December 7 or 8 [R. 219-20]. On December 9, 1952, the military body peremptorily issued a purported Warrant of Attachment, and without prior notice, four armed Military Police proceeded to the law offices of petitioner in Long Beach, California, and forcibly brought him before

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[5]The Manual for Courts-Martial, 1951 (MCM), p. 285, provides: "Military or civilian counsel detailed, assigned, or otherwise engaged to defend or represent an accused before a court-martial or upon review of its proceedings, or during the course of an investigation of a charge, are attorneys, and the accused is a client, with respect to the client and attorney privilege." See also, 50 U. S. C. 602, 731(d). Subsequently, and because of his refusal to answer these inquiries, petitioner was charged with a violation of 50 U. S. C. 622 in an information filed in the District Court. On a motion to dismiss the information prior to trial, the District Court held that petitoner had waived his privileges by the sending of the written communication, the court mistakenly assuming that the letter was some appeal from Bennette's subsequent court-martial and an attack upon members of the court-martial. United States v. Shibley, 112 Fed. Supp. 734 (D. C., 1953). The legal and factual issues were mooted, however, when the jury acquitted the petitioner on some counts of the information and made

the Court of Inquiry at the military establishment [C. Tr. 22].

Petitioner was again before the Court of Inquiry on December 9 and 10 [R. 220]. The court sat thereafter on December 11 and 12 [R. 220], when its proceedings were concluded. The court was in session eight days in all [R. 220]. The only days when petitioner was not present at the sessions of the court were the first day, December 3, 1952, and the last two days, December 11 and 12, 1952 [R. 219-220].

By December 17, 1952, the proceedings had been entirely transcribed, requiring only the signature of the Commanding General of the Marine Base, who signed on December 19, 1952 [R. 222]. An original and three copies of the transcript (227 pages) were sent to the Commandant of the Marine Corps at Washington, D. C. [R. 202]. A fifth, sixth or seventh copy of the transcript was placed on December 19, 1952, in a drawer of a filing cabinet in one of the offices of the law building situated on the Marine Base [R. 202]. This copy was subse-

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no finding with respect to the others. After the jury verdict, the trial court sentenced petitioner to 30 days imprisonment in summary contempt proceedings. Rule 42(a), Federal Rules of Criminal Procedure.

On appeal to the Court of Appeals, this judgment of contempt was confirmed but the case was remanded to the same trial judge to reconsider the contempt sentence in view of the passage of time and the affirmance of the judgment of conviction here involved. The opinion is unreported (No. 14464); both the criminal appeal herein and the contempt appeal were argued at the same time in the Court of Appeals. The cases are related and the record of the contempt case contains additional material on the the arbitrary treatment of petitioner as civilian counsel by the military officials who actively assisted in the contempt prosecution and the prosecution herein. A petition for a writ of certiorari will be filed in the contempt case, and will thus enable this Court to consider these two related cases together.

quently missed. Petitioner has been convicted under 18 U. S. C. 641 and the general conspiracy statute (18 U. S. C. 371) and sentenced to 3 years imprisonment for allegedly arranging to have another person appropriate the transcript for petitioner's use, the jury specifically finding that the transcript was worth less than $100 [C. Tr. 91].

The Indictment and Trial.

The indictment returned on June 25, 1953, was in four counts [C. Tr. 2]. The first count charged petitioner and one Charles Raymond Thompson, with entering, on December 19, 1952, lands reserved for the exclusive use of the United States with intent to commit larceny therein in violation of 18 U. S. C. 7 and 13 and California Penal Code 459 and 460. The petitioner was charged in the said count with aiding and abetting Thompson in the commission of the said offense. The jury returned no verdict against petitioner on this count of the indictment [C. Tr. 2, 91].

The second count charged petitioner and Thompson with stealing "a copy of the transcript of the proceedings of a United States Marine Corps Court of Inquiry convened to investigate charges made against certain Marine Corps personnel by defendant George E. Shibley" [C. Tr. 3], said copy alleged to have a value of over $100, all in violation of 18 U. S. C. 641. This count of the indictment was dismissed as to petitioner prior to trial on motion of the prosecutor [R. 5-8].

The third count of the indictment [C. Tr. 4] alleged that petitioner and Thompson received, concealed and retained the aforesaid copy with intent to convert the

said copy to their own use and gain, knowing the copy to have been stolen, in violation of 18 U. S. C. 641. This count was dismissed as to Thompson prior to trial [R. 4]. The jury returned a verdict of guilt and fixed the value of the copy at less than $100 [C. Tr. 91]. The sentence was one year imprisonment [C. Tr. 179], the maximum term permissible under the Statute, 18 U. S. C. 641.

The fourth count [C. Tr. 5-6] alleged that petitioner and Thompson conspired (18 U. S. C. 371) to commit the substantive offenses as set forth in the first three counts, the subject matter of the conspiracy being the same copy of the transcript as aforesaid. The jury returned a verdict against petitioner on this count [C. Tr. 91].[6] The sentence was three years imprisonment, sentences under the third and fourth counts to run concurrently [C. Tr. 179].

The Court of Appeals below, in affirming the judgment of conviction, stated: "The main framework of the case was laid by the testimony of Thompson, the co-defendant" (App. A, p. 4). The court also stated: "It is true the testimony of Thompson, as a co-conspirator and the chief actor, was necessary to give continuity to

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[6]The jury deliberated for twenty-four hours, covering a two day period [R. 495-578]. At the end of that time, they returned to the courtroom with a request for further explanation of the instructions on conspiracy [R. 561]. The court reread a portion of the instructions previously given, and immediately followed this with the "Allen" instruction (164 U. S. 492), unsolicited by the parties [R. 561-73]. The jury undoubtedly retired with the impression, under the coercive circumstances [R. 568-72], that the all-important thing was a final disposition of the case. *Cf., Burton v. United States,* 196 U. S. 283, 304-308.

the circumstances and was the sole support of a considerable portion of the case for the prosecution" (App. A, p. 6). The fact is, as the record makes clear, the testimony of Thompson was the sole basis for the judgment of conviction.[7]

The questions presented in this proceeding assume additional significance because the case as finally made by the prosecution had all the earmarks of a scheme by a pliable and unsavory witness to extricate himself from

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[7]Thompson was confined in a private sanitarium for the mentally afflicted and sick in New Orleans in 1949 [R. 168], where he received electric shock therapy [R. 169]. In the same year, he was also confined in the Gulfport Hospital in Mississippi, a veterans' hospital, for a mental affliction [R. 169]. On April 28, 1950, he was confined in the State Institution in Central Louisiana at Pineville, Louisiana, by an order issued out of the 15th Judicial Court of Louisiana for the Parish of Vermillion in the town of Abbeville [R. 167]. As of the time he testified, the order of commitment had not been set aside [R. 168]. It was not denied that in 1952 he had debauched a young girl of sixteen and taken her from California to Nevada for the purpose of having sexual relations with her [C. Tr. 146]. He had been employed in 1952 by a Captain J. B. Worley, who ran a private detective agency in Long Beach, California [R. 350]. Captain Worley testified that Thompson's reputation for truth, honesty and integrity was very bad [R. 353] and that he would not believe him under oath [R. 353]. In reply to an inquiry by the court, the witness testified that Thompson "stole a lot of money from me and a lot of other people's in Long Beach" [R. 354]. The Court below held that this reputation testimony was properly stricken by the trial court because "the witness clearly stated he was testifying to a time after finding of the indictment" (App. A, p. 10). The reputation testimony covered the period from July 11, 1952, to May 6, 1953 [R. 352]. The indictment was not returned until June 25, 1953 [C. Tr. 2]. Petitioner's office had used the services of Captain Worley and his staff on occasions for process serving and investigations in civil cases. Thompson had only met petitioner within two months before December 19, 1952 [R. 142].

his own wrongdoing by fixing the blame upon an attorney who had incurred the animosity of the military officials.[8]

The case came down to this: A corporal in the Marine Corps had been petitioner's escort from the "gate" at the Marine Base to the legal office in the law building inside the Base where the Bennette court-martial proceedings were held [R. 78]. The corporal testified that he felt that petitioner had not been accorded "the courtesy that civilian counsel is usually accorded upon the base" [R. 82]. When he learned how petitioner had been forcibly taken from his law office to the Court of Inquiry, he spoke to petitioner and told petitioner if there were anything he could do to help he would [R. 59, 83-4]. The corporal testified that the petitioner didn't ask him for any help [R. 85]. The corporal had nothing dishonorable

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[8]Two months after the copy of the transcript was missed, Thompson told agents of the Office of Naval Intelligence that petitioner had nothing to do with its taking [R. 184]. He was arrested and taken into custody on May 26, 1953 [R. 185]. The indictment was filed on June 25, 1953. He was arraigned on July 6, 1953 [Pr. R. 9], represented by separate appointed counsel [Pr. R. 21]. On October 27, 1953, his counsel stated that Thompson was ready for trial [Pr. R. 79]. On November 12, 1953, his counsel was still ready for trial [Pr. R. 87], and agreed to try the case on November 24 [Pr. R. 89]. On November 16, 1953, for the first time, counsel indicated that Thompson's plea would be changed only "if the case is (not) going to be continued to an indefinite period of time." [Pr. R. 98.] Thompson was released immediately on his own recognizance [Pr. R. 104]. He changed his plea for the first time on the opening day of trial, December 8, 1953, pleading guilty to the first and fourth counts of the indictment [R. 3-5]. Despite his admissions at the trial, this "chief actor" (App. A., p. 6) received a suspended sentence [C. Tr. 119]. A corporal in the Marine Corps who had told Thompson where the copy of the transcript was located and when it might be obtained unknown to the others at the military establishment [R. 57-108] was never disciplined by the military nor prosecuted by the civil authorities [R. 105-6]. The corporal completed his active duty in the Marines in 1953 and still retained the rank of corporal in the Marine Corps Reserve when he testified [R. 76].

in mind, and petitioner never requested him to do anything dishonorable [R. 85]. Petitioner thanked the corporal, took his name and address and said that a man named "Rusty" might contact him [R. 59, 85-6]. This was on December 9, 1952, and the corporal never saw or spoke to petitioner thereafter [R. 86-7].

Thompson, also known as "Rusty," testified that about December 1, petitioner called Thompson to his office. The discussion was about some investigation work dealing with two court-martial proceedings, one involving Bennette and another, a Lieutenant Billie Adams [R. 115, 145]. Petitioner asked Thompson to contact Lieutenant Adams and the corporal [R. 115]. There was no mention of any transcript of the Court of Inquiry.

Thompson visited the corporal thereafter and had a number of conversations with him, all out of the presence of petitioner [R. 86-7]. Thompson initiated the inquiry about the copy of the transcript of the Court of Inquiry, informing the corporal that he was interested in obtaining information about all the proceedings at the Marine Base for the Judge Advocate in Washington, D. C., a senator and "Drew Pearson" [R. 91]. He informed the corporal that "various interests back East" were interested in the outcome of cases tried at the Marine Corps Air Station [R. 65].[9]

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[9]Thompson had been in the Marine Corps himself, and later enlisted in the Marine Reserves. He never gave the Reserves a history of his mental afflictions [R. 171]. Thompson, in 1952, was rooming with a Pat Fields, a confirmed drunkard [R. 134-40, 372-74], who, prior to December 19, 1952, had been an investigator for Drew Pearson, in Washington, D. C. and in California [R. 240]. Thompson and Fields had been living together in various rooming houses [R. 134-40], where Thompson kept his Marine uniforms [R. 135].

From the corporal, Thompson learned when a copy of the transcript would be available and where it would be located [R. 72-4]. A few days before December 19, 1952, Thompson visited a photographer in Long Beach to inquire if the latter could photograph a transcript, and apparently received an affirmative answer [R. 395]. On December 19, 1952, Thompson went to the home of his friend, Pat Fields, put on his Marine uniform, and in the early morning of December 20 went on the Marine Base and obtained a copy of the transcript [R. 127-8].

December 20 was a Saturday. Thompson took the copy of the transcript to the photographer who, with the aid of an employee, succeeded in having a photograph and a negative of the copy of the transcript ready the next day, Sunday [R. 396-99]. On Sunday, Thompson paid the photographer $150 as requested, and took with him the three documents [R. 399].

Thereafter, Thompson and his roommate, Pat Fields, wrapped the three transcripts, put on the name of a fictitious sender, and mailed the documents by registered mail, return receipt requested [R. 230-4]. The copy of the transcript alleged in the indictment was sent to Drew Pearson. The photographic copy was mailed to the office of petitioner's attorney, and the negatives mailed to petitioner at his law office [R. 231-33]. The registry receipts were kept by Thompson and Fields [R. 234]. They were therefore in the position, through the registry receipts, of proving to any or all of the recipients, if the

material was used, that they were responsible for the availability of the documents and entitled to their reward. If the material was not used, and no reward was forthcoming, they were assumedly secure from detection.

As noted aforesaid, it was more than six months after his initial conversations with Federal agents and after his release from jail on his own recognizance that Thompson for the first time implicated petitioner (*supra*, note 8). At the trial, Thompson did not purport to testify to any request by petitioner to Thompson to obtain the transcript for petitioner, nor did he maintain that petitioner knew any of the details of his conversations with the corporal. His sole statement in response to an inquiry was simply: "I talked to Mr. Shibley about this every day." [R. 120.] Thompson stated that on December 19 he spoke to petitioner and told him that the records were being transmitted and would be unavailable thereafter [R. 125-26]. Petitioner allegedly asked Thompson if the records could be gotten, and Thompson stated: "Yes, it appears as though they can." [R. 126.] Petitioner purportedly inquired of Thompson whether the latter had in mind what he was going to do and Thompson said he did [R. 126]. Thompson attributed to petitioner an additional statement, "something to the effect" that Thompson shouldn't forget to wear gloves "or something like that" [R. 126]. This was the substance of the entire testimony involving petitioner on the substantive and conspiracy counts prior to the disappearance on December 19, 1952, of the copy

of the transcript of the Court of Inquiry from the law office on the military base.[10]

Petitioner took the stand and denied the evidence in the prosecution's case which purported to implicate him in the offenses charged in the indictment [R. 289-347]. His testimony was supported by his secretary [R. 260-273, 359-68], by Daniel G. Marshall, Esq., his attorney [R. 273-88], and by Sergeant Bennette, his client at the Marine Base [R. 349-50]. The testimony of Thompson's employer as to Thompson's bad reputation, as aforesaid, was stricken by the trial court [R. 350-57].

The petitioner's position throughout the trial was that the tenuous case against him had been patently contrived, that he had no motive or reason for receiving a stolen copy of the transcript of the Court of Inquiry or conspiring to receive such a purloined copy. It was his contention that under the Uniform Code of Military Justice, the Navy regulations governing the Marine Corps, and the law military, as well as under the civil law, he was entitled to receive a copy of the entire transcript free

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[10]Thompson stated at the trial that the idea of photographing the copy of the transcript and mailing the documents was petitioner's, suddenly conceived when Thompson showed petitioner the copy of the transcript on Saturday, December 20, 1952 [R. 129]. Thompson stated that he told petitioner that the photographer had asked $200 for the job, that petitioner agreed to pay it, and that Thompson received $200 in cash from petitioner's secretary on Monday and paid the photographer on that day, receiving the documents at that time [R. 191]. This was proven to be patently false by the prosecution witnesses themselves, the photographer and his assistant, who were called belatedly by the prosecution virtually upon the trial court's insistence [R. 174], and who testified that Thompson had inquired about photographing a transcript some days before December 20, that the sum charged was $150 and that Thompson had paid that sum on Sunday and taken away the documents on that day [R. 381-99].

of charge and to inspect and copy it [R. 310-17], that this was his understanding before the copy of the transcript was missed [R. 310-19].

Petitioner's attempt to prove his innocence, his absence of motive, knowledge and intent was sharply curtailed by the courts below by what appears to be a misconstruction of 18 U. S. C. 641 as interpreted by this Court in *Morissette v. United States,* 342 U. S. 246, and in conflict with relevant decisions of other Courts of Appeal. In the light of the tenuous character of the case against petitioner and the lengthy deliberations of the jury before reaching their verdict, the rulings of the courts below on this aspect of the case take on crucial importance.

The testimony showed that petitioner had retained counsel on the evening of December 9, 1952 [R. 275], the day when petitioner had been forcibly removed from his law offices to the Marine Base to again appear before the Court of Inquiry [R. 275]. He consulted with his attorney thereafter [R. 275]. Petitioner sought to show through his own testimony and that of his attorney, that he had been advised by his counsel as to his absolute right to a copy of the transcript of the Court of Inquiry under the military law, and also under the civil law in the event contempt proceedings were initiated for failure to answer the inquiries of the Court of Inquiry [R. 276-78, 282-84, 312, 582; C. Tr. 113]. All of his testimony was excluded, the trial court stating: "The substance of my ruling was to the effect that any statement that this man may have made to his attorney or any advice his attorney gave him would be self-serving" [R. 312, 582]. The Court of Appeals below sustained this position, holding that the "defendant was allowed to testify as to his belief upon these matters. Therefore, so far as motive

was concerned, the proof was before the jury. His belief, and not the facts or the advice, was the important matter." (App. A, p. 9.)

Petitioner requested the trial court to instruct the jury that in determining "whether or not the said defendant had a motive for the commission of the offenses," the petitioner had a legal right prior to December 19, 1952, to inspect the record or a copy of the entire transcript of the Court of Inquiry [C. Tr. 71]. Petitioner requested an instruction that in the determination of his motive the jury should consider that on or before December 19, the record of the Court of Inquiry was a public record which petitioner was entitled to inspect [C. Tr. 72]. There were other requested instructions in the same vein [C. Tr. 73-76]. All of these instructions were refused. No others of similar import were given or attempted by the trial court. Instead of informing the jury on the state of the military and civil law in the light of petitioner's claim that under the law petitioner had no reason or motive for committing the offense, the trial court instructed the jury, over petitioner's objection, as follows:

> "The transcript of the Court of Inquiry proceedings affecting the defendant Shibley, a copy of which defendant Shibley would eventually have been entitled to receive." [R. 476.]

This cryptic instruction was construed by the trial court as follows: "So far as this case is concerned the only thing he was entitled to at all would be, eventually, to have received a copy of the transcript affecting him and I have so instructed the jury and I will not go any further on that." [R. 505.] The transcript of the Court of Inquiry covered eight days; petitioner was present five days. The only days when petitioner was not present

was the first day and the concluding two days [R. 219-20]. Thus, the jury was instructed that petitioner could not have reasonably expected "at all" to receive the entire transcript, that he would eventually have received only the portion of the transcript affecting him, and, in effect, that petitioner had a motive for purloining the document. This was a paraphrase of the prosecution's theory of the case.[11] The petitioner thus was not only denied the opportunity to present evidence in support of his contention that he had no reason to commit the offense, but, following denial of his requested instructions, petitioner was placed in the position by the trial court before the jury of actually having a motive as a matter of law to commit the crime.

The Court of Appeals below held that the instruction given "was more than fair" (App. A, p. 10); that petitioner's requested instructions had properly been refused; that absence of motive was "only the foundation of a jury argument" (App. A, p. 10); that motive was not an essential element of the prosecution's proof, and that "even in the absence of any conceivable motive defendant could still be convicted." (App. A, p. 10.)

Suppression of Evidence by Prosecution and Motion for New Trial on Newly Discovered Evidence.

The verdict was returned on December 12, 1953 [R. 573]. About thirty days later, petitioner moved for a new trial based upon newly discovered evidence [C. Tr. 121-77]. The motion was summarily denied by the trial court without opinion [R. 596].

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[11] In his summation, the prosecutor stated to the jury: "The law is that Shibley was entitled to that portion of the transcript consisting of his testimony which comprised less than one-half of the testimony taken at that Court of Inquiry." [R. 462.]

The evidence in support of the motion was as follows:[12] Mr. and Mrs. Shibley lived with their children at a home in Long Beach [C. Tr. 136]. In or about June, 1952, a young girl, Yvonne Fuller, about sixteen years of age, was placed under the supervision of the Shibleys by the California Youth Authority as a "mother's helper" [C. Tr. 136]. Yvonne met Thompson early in December, 1952, and began to go out with him, unknown to petitioner and his wife [C. Tr. 146]. On December 19, 1952, Thompson phoned Yvonne in the middle of the afternoon and asked her if she wanted to go out that night. Thompson warned Yvonne not to tell the Shibleys and to meet him at a drugstore corner at about 7:00 p. m. [C. Tr. 147]. She met Thompson at the appointed hour and place [C. Tr. 147]. Thompson was wearing a Marine uniform, a uniform she had never seen him wear before [C. Tr. 147].

Thompson took Yvonne to the corporal's home. On the way, he asked her if she could hold some important papers for him and hide them secretly from everybody including the Shibleys [C. Tr. 149]. Yvonne said she couldn't do that at the Shibley's home, but she could keep them at her family's home in Lawndale [C. Tr. 149]. She asked if there was something illegal about it and Thompson stated: "Well, only in a way." [C. Tr. 149.] Thompson told Yvonne he would get a lot of money for the papers, that they probably would be able to get married "because there would be a lot of money coming in from some big newspapers" [C. Tr. 149]; that he wasn't scared, he was protected and could "always pin it on someone else." [C. Tr. 149.]

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[12]No opposing affidavit was submitted by Thompson.

Yvonne met the corporal and his wife at their home, but she was introduced merely as a "lady friend" and heard nothing of the private conversation between the corporal and Thompson [C. Tr. 149]. Thompson drove her later that night to a motel in Santa Ana [C. Tr. 149].[13] He told her he had to be at El Toro (where the Marine Base was located) at about 2 or 2:30 a.m. He returned about 3 o'clock and then they went back to bed together and slept until morning [C. Tr. 149-50].

On the way back to Long Beach the next morning Thompson told Yvonne that he would spend most of the day at "Joe's, a photographer" [C. Tr. 150]. He let Yvonne off at the drugstore, and told Yvonne that he would call her at the Shibleys [C. Tr. 150]. About noon, Thompson came to the Shibley home, saw petitioner in his bedroom for about 5 or 10 minutes and then left [C. Tr. 151]. Later in the afternoon, Thompson called Yvonne on the phone. He said he was going to stay at the photographers. He told Yvonne that petitioner had treated "him like a criminal and that Mr. Shibley was very angry with him, with Rusty, and that Shibley had booted him out of the house." [C. Tr. 151.][14]

Thompson told Yvonne he didn't want her to stay at the Shibleys. Yvonne, that very day (Saturday), told the Shibleys she was leaving to stay with her father

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[13]Thompson, from their initial meetings, had promised the young girl he would marry her. He had sexual intercourse with her many times, once driving her to Las Vegas, Nevada, where they stopped at a motel for the consummation of such purpose. [C. Tr. 146.]

[14]Petitioner on the stand during the trial denied any knowledge that Thompson intended to steal the copy of the transcript or any prior conversations with respect thereto. He stated that Thompson had come into his bedroom on Saturday at about noon and showed

and step-mother in Lawndale [C. Tr. 151]. She was at Lawndale on Sunday where Thompson called for her and took her to the Photo Shop [C. Tr. 151]. Thompson, still resentful for being thrown out of petitioner's home, urged Yvonne never to say anything about how he got the papers at El Toro, neither to petitioner nor his wife nor anyone else [C. Tr. 152].

Thompson went into the photo shop and came back with a copy of the transcript, the photograph and negative [C. Tr. 153]. He put all the documents in a strong box which had a combination lock [C. Tr. 153]. He gave the box to Yvonne. At her home in Lawndale, Yvonne "sneaked the box in the house and hid it in my bedroom" [C. Tr. 153]. Thompson told Yvonne that if anyone found the box at home "I could say that it was something Mr. Shibley gave me to keep for him," and not to mention Rusty's name [C. Tr. 153]. She kept the box for about two or three days and then returned it to Thompson [C. Tr. 153-4]. Thompson, as was shown at the trial, together with Pat Fields, the former investigator of Drew Pearson, later mailed the documents as aforesaid, registered mail, return receipt requested.

All of the foregoing was unknown to petitioner and his counsel prior to and during the trial [C. Tr. 128-30, 132-34, 141-43]. Also unknown to petitioner and his counsel were the following circumstances which occurred

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him what appeared to be a transcript [R. 306]. Petitioner asked him where he got it, and Thompson told him that it was not classified or restricted material, that "it is perfectly okay only I have to get it back by 5:00 o'clock tomorrow night, Sunday night." [R. 307.] Petitioner immediately told Thompson to take it away, and Thompson did [R. 307]. Petitioner did not know at the time he testified that Yvonne Fuller could confirm his testimony, that she knew that petitioner had "booted" Thompson out.

after the discovery by the military officials that one of the office copies of the transcript of the Court of Inquiry was missing, and when the movement to ensnare petitioner through Thompson began.

From the corporal, the agents of the Naval Department apparently learned about Thompson and his "lady friend," Yvonne Fuller. On May 18, 1953, Yvonne was in custody in Los Angeles County Juvenile Hall. There she was interviewed privately by two agents [C. Tr. 172-3], and signed a statement less than one page in length, typed up by the officers [C. Tr. 176]. She stated that she had registered in a motel with Thompson on December 19, 1952, that Thompson had left her at the motel, travelled to the Marine Base, stole the document, and returned to the motel [C. Tr. 174-6]. The statement did not include any facts as to how she came to go with Thompson to the motel, what he told her, or any other relevant information normally obtained by investigative officers. The short prepared statement [C. Tr. 176] did not essentially contradict her detailed testimony in support of the motion for a new trial, although it varied in minor particulars. It appears clear from the statement that she was known to the agents on May 13, 1953, as an essential witness. Eight days later, Thompson was arrested [R. 185].

When months later, Thompson finally implicated petitioner and the case was nearing trial, the prosecutor obtained "a writ of habeas corpus ad testicandum" from the United States District Judge and Yvonne Fuller was placed in the custody of the United States Marshall [C. Tr. 166]. In this manner, Yvonne was brought to the prosecutor's office where she stated that she was

willing to testify against Thompson, but not against petitioner [C. Tr. 166]. The prosecutor told her that this was a matter for the trial court to decide, that unless she had a valid constitutional objection, the Court could hold her in contempt [C. Tr. 166]. Yvonne insisted, stated the prosecutor in a sworn affidavit in opposition to the motion for new trial, that she would not testify against petitioner [C. Tr. 166]. Nevertheless, Yvonne Fuller was kept in the custody of the United States Marshal and she "was present in the United States Marshal's office in the U. S. Post Office and Courthouse during the course of the Shibley trial" [C. Tr. 166].

As heretofore noted, all of the aforesaid was unknown to petitioner, his counsel or the trial court itself. Petitioner swore, his counsel, reputable members of the Bar, swore, that in preparation for trial no one knew that this sixteen year old girl had knowledge of any facts material to petitioner's defense [C. Tr. 128-30, 132-4, 141-3].

The following occurred at the trial: Thompson had insisted on the stand, as aforesaid, that he had a number of conversations with the corporal, confirmed by the latter, and that on some of these occasions Thompson had been accompanied by his "lady friends." The corporal recalled "a young girl, a blonde by the name of Yvonne" [R. 69] and a lady known as "Marvel Bloomquist" [R. 121]. Both the corporal and Thompson insisted that neither of these ladies knew anything about their conversations; they were just social companions whose presence could corroborate the meetings of the corporal and Thomp-

son [R. 57-108, 114-198]. While Thompson was being cross-examined by petitioner's counsel, he denied that he ever took narcotics but volunteered that the young lady with him on December 19 might have [R. 172]. When he was pressed to answer, the prosecutor objected:

> "Mr. Bowler: I am going to object to this line of interrogation. The girl, whoever she was, is not on trial and that has no bearing on the issues involved here. I object to it as immaterial and not proper impeachment." [R. 172.]

However, on redirect examination, the prosecutor asked Thompson to state where the young girl whom Thompson referred to as a possible narcotic addict, lived on December 19 [R. 188]. Thompson didn't know where she lived on that day, but stated that prior thereto she lived at petitioner's home [R. 188].[15] This attempt to besmirch petitioner and his wife was met by an inquiry on recross examination by petitioner's counsel as to whether Thompson knew that Yvonne Fuller had been paroled to petitioner's wife by the Youth Authority of California [R. 195].

> "Mr. Bowler: That is objected to as calling for a conclusion of this witness.
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> The Court: I don't think that is proper, counsel. You must remember there is only one person on trial in this case now.

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[15]Thompson equivocated because, as later appeared after the trial, he knew that at about that time Yvonne left petitioner's home to move to Lawndale [C. T. 151].

Mr. Ball: That is correct. Let me say this: That little girl was working as a maid in that home.

The Court: Let us not discuss her.

Mr. Ball: But he tried to bring out she was living there in Shibley's house. We want to show the situation.

Mr. Bowler: You can't show it by this witness. You might be able to show it by other witnesses.

The Court: Is she here?

Mr. Bowler: She is available, your Honor, and we will have her here.

Mr. Ball: I won't pursue the question then.

The Court: I think you are getting on dangerous ground, counsel.

Mr. Ball: But I didn't want to leave any inferences at all. I won't pursue it, your Honor, if your Honor thinks it is immaterial. I won't go into it." [R. 195-6.]

This side issue thus was apparently eliminated from the case so far as petitioner's counsel was concerned. The other "lady friend," Marvel Bloomquist, was called and gave innocuous testimony [R. 241-5, 376-77]. The prosecution rested without calling Yvonne Fuller, the prosecution alone knowing that Yvonne Fuller, an essential witness with significant testimony who had refused to testify against petitioner, was in the custody of the United States Marshal in the courthouse where the case was being tried.

The Court of Appeals held that it was "open to grave doubt" that reasonable diligence had been employed by

counsel for petitioner; that Yvonne was "available to defendant so that he could have availed himself of the opportunity to interview her"; that the prosecutor had not been guilty of suppression of evidence (App. A, p. 8). The court below held that the trial court's denial of the motion was conclusive because there was no manifest abuse of discretion under Rule 33 of the Federal Rules of Criminal Procedure, and that under the circumstances Yvonne Fuller's testimony could not be "of such a nature that it probably would produce an acquittal." (App. A, p. 8.)

In affirming the judgment of conviction, the Court of Appeals held also that the evidence was sufficient to justify the conviction under 18 U. S. C. 641 and 18 U. S. C. 371 and that the sentence of three years on the conspiracy count was not illegal, despite the jury's finding in essence that the object of the conspiracy was a misdemeanor. Other questions of law raised by petitioner were also dismissed by the court below as insufficient to justify a reversal of the conviction (App. A, pp. 10-14).

ARGUMENT AND REASONS RELIED UPON FOR GRANTING THE WRIT.

A.

The Court of Appeals below has decided federal questions in conflict with applicable decisions of this Court and has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matter.

I.

The Courts Below Erroneously Construed and Applied 18 U. S. C. 641, the General Conspiracy Statute, the Uniform Code of Military Justice and the Rules and Regulations Thereunder by Refusing to Permit Petitioner to Prove That He Had No Reason or Motive for Appropriating the Office Copy of the Transcript of the Court of Inquiry and by Prejudging the Issue in Instructions to the Jury and Refusals to Instruct, With the Resultant Deprivation of Petitioner's Liberty Without Due Process of Law in Violation of the Fifth Amendment.

This Court recently construed 18 U. S. C. 641 in *Morissette v. United States*, 342 U. S. 246. It was there held that criminal intent is an essential element of the offense; that the existence of the intent or absence of intent is a question of fact which must be submitted to the jury for determination in the light of all relevant evidence.

The courts below have construed and applied 18 U. S. C. 641 in this case contrary to the decisions of this Court in *Morissette*. The charge against this petitioner was that he knowingly received an office copy of the transcript of the Court of Inquiry with intent to convert the copy to his own use and gain, and conspired with Thompson, the "chief actor" (App. A, p. 6) and the "sole support

of a considerable portion of the case for the prosecution" (App. A, p. 6), to do so. Petitioner's principal defense was that he had no reason to commit the substantive offense or to conspire with Thompson, that he had no motive for the commission of these offenses. In short, petitioner contended that he was innocent of any wrongdoing and sought by evidence and requested instructions to bring all the circumstances before the jury. Instead, in law and in fact he was blocked by the trial court from proving his innocence and his guilt presumed as a matter of law.

A. It is fundamental that an accused may always offer evidence to show that he did not have any motive or reason to commit the crime. Wharton's *Criminal Evidence* (12th Ed.), Vol. I, Section 166, p. 324; Wigmore, *Evidence* (3rd Ed.) Vol. I, Sections 118-119, Vol. II, Section 254. Especially is this true where an accused denies the commission of the crime, where the testimony against him on both the substantive and conspiracy counts hinges entirely on the tenuous testimony of a single unsavory witness, the admitted "chief actor" in the crime, and where corrupt motive or fraudulent intent is made an important element of the prosecution's case. *Cf., Morissette v. United States*, 342 U. S. 246; *Screws v. United States*, 325 U. S. 91, 101; *Potter v. United States*, 155 U. S. 438; *Spurr v. United States*, 174 U. S. 728, 735. See also *Krulewitch v. United States*, 336 U. S. 440.

The courts below held that the aforesaid rules of law were satisfied by limiting petitioner's evidence on this issue to his own disclaimer of any reason or motive for commission of the alleged offense. The independent testimony which petitioner offered to prove his state of mind was rejected as "self-serving" by the trial court. The

Court of Appeals held that petitioner's belief, and not the independent evidence was "the important matter." (App. A, p. 9.) These rulings are squarely in conflict with the decisions of other Courts of Appeal on the same matter, and forestalling as they did petitioner's opportunity to prove his innocence in a case based on suspiciously flimsy and contrived evidence, the rulings operated to deprive petitioner of a fair trial in the federal courts. See, *Kotteakos v. United States,* 328 U. S. 750, 765; *Potter v. United States,* 155 U. S. 438, 448.

The correct rule of law is most cogently stated in *Miller v. United States,* 120 F. 2d 968, 970 (C. A. 10, 1941):

> "Whenever the belief of a person or the motive of his act or conduct is material, he may not only directly testify that he had no intent to defraud, but he may buttress such statement with testimony of relevant circumstances, including conversations had with third persons or statements made by them, tending to support his statement that he had no intent to defraud."

Judge Hand rejected the label "self-serving" for such independent testimony in the Second Circuit, and added that "it was not fair to confine him (the accused) to a bare denial—never impressive in the mouth of the accused." *United States v. Matot,* 146 F. 2d 197, 198 (C. A. 2, 1944). Judge Lindley for the Seventh Circuit has recently adopted the Hand reasoning. *United States v. Bucur,* 194 F. 2d 297, 301 (C. A. 7, 1952). In an earlier decision in the same Circuit, it was held that the evidence of those accused on the issue of their state of mind "is to be weighed as other evidence, but on account of their intense interest their statements as to their intention are to be considered with great caution. For

this reason circumstantial evidence, as in all such cases must play an important part in the determination of that fact, and all circumstances which reasonably throw light upon that subject, either directly or indirectly, should be received in evidence on behalf of both the Government and those charged with crime." *Norcott v. United States*, 65 F. 2d 913, 919 (C. A. 7, 1933.[16] This reasoning, of course, underlay the opinion of Justice Jackson in *Morissette, supra*, p. 276.

In the case herein, the prosecution urged upon the jury consideration of the fact that petitioner had a reason for committing the offenses because petitioner was never entitled to receive a portion of the transcript. Petitioner testified that he believed he was entitled to receive the entire transcript, but the court instructed the jury that the petitioner was an interested witness and to consider on his credibility "all the matters that have been suggested to you in that connection." Thus, the prosecution received full opportunity to prove and urge motive and reason for commission of the offense, but petitioner was unable to support his own disparaged testimony by independent and cogent testimony proving his innocence. This Court, it is respectfully submitted, should not permit such unfair and erroneous construction of 18 U. S. C. 641 and the conspiracy statute to stand, when it is considered moreover that other Courts of Appeal have held such

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[16]The trial court here instructed the jury: "The defendant has offered himself as a witness and has testified in the case. Having done so, you are to estimate and determine his credibility in the same way as you would consider the testimony of any other witness. It is proper to consider all of the matters that have been suggested to you in that connection, including the interest that the defendant may have in the case, his hopes and his fears, and what he has to gain or lose as a result of your verdict." [R. 472.]

rulings to be contrary to the fair administration of criminal justice in the Federal courts.[17]

B. The courts below, moreover, compounded the unfairness of the trial on the same issue by holding as a matter of law that petitioner under the circumstances of the case herein could not reasonably have supposed that he eventually would receive a copy of the entire transcript of the proceedings in which he was so directly involved.[18] Thus, as a matter of law the jury were instructed, in accordance with the view of the prosecutor, that petitioner had a reason and motive for committing the offenses. All efforts by the petitioner to have the trial court instruct the jury, on the issue of motive, as to the law concerning the right of interested persons to a transcript of a court of inquiry were unavailing. Indeed, no instruction was given to guide the jury on the state of the applicable law except the one sentence aforementioned which adopted the prosecution's theory of the case. *Cf. Bollenbach v. United States*, 326 U. S. 607.

The question assumes importance, not only because petitioner was deprived of the opportunity to prove absence of motive, and the jury instructed that motive did

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[17]Reversals on the same issue followed, in addition to the above, in *Frank v. United States*, 220 F. 2d 559, 563 (C.A. 10, 1955); *Berkovitz v. United States*, 213 F. 2d 468, 473 (C.A. 5, 1954); *Heindel v. United States*, 150 F. 2d 493, 497 (C.A. 6, 1945); *United States v. Wicoff*, 187 F. 2d 886, 890 (C.A. 7, 1951); *Haigler v. United States*, 172 F. 2d 986, 988 (C.A. 10, 1949); *Hyde v. United States*, 15 F. 2d 816, 821 (C.A. 4, 1926); *Buchanan v. United States*, 233 Fed. 257, 259 (C.A. 8, 1916).

[18]The indictment describes the document as "a copy of the transcript of the proceedings of a United States Marine Corps Court of Inquiry convened to investigate charges made against certain Marine Corps personnel by defendant George E. Shibley." [C. Tr. 4.]

exist, but because it raises an important question of federal law which should be settled by this Court. Did the petitioner as a matter of military and civil law have the right to reasonably assume that a copy of the transcript of the proceedings of the Court of Inquiry would be available to him for his own use, or was the jury properly instructed that no basis in law existed for such belief other than that petitioner would eventually receive only that portion of the transcript in which he was actually involved? The question should be settled by this Court if the rights of civilians and military personnel, as well as their counsel, enmeshed in conflict with military courts, are to be preserved. See *Toth v. Quarles*, 350 U. S. 11.

The constitution and the course of proceedings of courts of inquiry are governed by the general statutes and by the common law military as received and practiced in the Army and Navy. 50 U. S. C., Section 731; Winthrop, *Military Law and Precedents* (1920), pp. 516-33; Davis, *Military Law of the United States* (1915), pp. 218-21; Snedeker, *Military Justice Under the Uniform Code* (1953), pp. 211-214. As it is a sworn body, and as the witnesses before it are sworn and examined and cross-examined as before courts-martial, it is a Board of a higher sort in the nature of a court, and thus has come to be termed a court in the law military. Winthrop, *supra*, p. 517. "A court of inquiry conducts its proceedings similar to those of a general court-martial." Snedeker, *supra*, p. 212.

Under the Uniform Code of Military Justice, "the convening authority of a court-martial or military commission or a court of inquiry shall appoint qualified reporters, who shall record the proceedings of and testimony taken

before such court or commission." 50 U. S. C. 592. The court of inquiry is required to keep a record of its proceedings, which must be authenticated by the signatures of the president, of the court and counsel for the court before being sent to the convening authority. 50 U. S. C. 731. The ultimate action taken by courts-martial and courts of inquiry may differ, but courts of inquiry rank equal in importance with courts-martial. The hearings of a court of inquiry include not only matters affecting the transactions of officers or soldiers, but they include "accusations or imputations, that is to say charges of error or misconduct." Winthrop, *supra*, p. 522. They are not secret bodies to be analogized to grand juries. Winthrop, *supra*, pp. 523, 528; see 50 U. S. C. 731.

To what extent are persons interested in the records of courts-martial or courts of inquiry entitled to a copy thereof? The regulations issued by the Department of the Navy[19] provide, in the first place, that "a court of inquiry is governed by the general principles of military law, applying analogous rules of a court-martial where they are applicable. The court will refer to the Manual for Courts-Martial, United States, 1951, adjudged cases, precedents, authoritative legal opinions, and approved books of legal exposition where there is no pertinent stated rule. The mission of the court must be given primary consideration in the determination of procedural questions not covered in these regulations." *Naval Supplement to the Manual for Courts-Martial of the United States* (1951), par. 0309, p. 35. The Manual for Courts-Martial, Section 82(g), p. 135 and the Uniform Code

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[19]The Uniform Code of Military Justice defines "Navy" to include the "Marine Corps." 50 U. S. C. 551.

of Military Justice, 50 U. S. C. 629(c) provide that a copy of the record of the proceedings shall be given to the accused as soon as the original record is authenticated. "Congress felt it to be appropriate that each accused in such cases should have a copy of the record for his personal use. It is the duty of the trial counsel to furnish the accused with this copy. It is furnished without expense to the accused." Snedeker, *supra*, p. 411. Moreover it has been held that any person having an interest in the record of a naval court-martial on file in the Navy Department is entitled to have an exemplified copy of it after the proceedings are consummated by the action of the proper revisory authority. 1865, 11 Op. Atty. Gen. 137.

It will thus be seen that petitioner, situated as he was, could reasonably assume from the appropriate statutes, the Manuals, the Naval regulations, the legal precedents and text writers, that as an accused person facing prosecution for failure to answer the inquiries of the military court, he was entitled to receive a copy of the transcript of the proceedings for his own use. Moreover, no problem of security classification was involved and while, under the usual regulations, all records of the Naval Department were in the custody of the department, still it was provided in the regulations that the records of proceedings of "courts of inquiry" were always available, for the asking, to interested persons. "The Secretary of the Navy, or his designee, may make such records or information therefrom available to persons properly and directly concerned whether or not litigation is involved." *Federal Register*, December 12, 1951, pp. 12504-5.

The trial court, as noted above, declined to give any instructions along these lines on the issue of motive.

It implicitly recognized, however, that petitioner was reasonable in assuming that a copy of the transcript was available, but instead of giving petitioner's requested instructions, the trial court improvised the view that petitioner could only reasonably assume at all that he would get a portion of the transcript, and this view of the law alone was imparted to the jury.[20]

As a matter of military law there is no provision for an attenuated transcript of a military court. The intent of Congress in enacting the Uniform Code of Military Justice was to see that records of military courts should be verbatim, complete and authenticated. Snedeker, *supra*, p. 404, *et seq.* In any event, the test of reasonableness must be measured by the petitioner's situation. The petitioner at the proceedings before the Court of Inquiry had challenged its jurisdiction, alleging that it had been improperly convened for illegal purposes, and he had challenged the members of the Court for cause. 50 U. S. C. 731(d). To sustain this challenge, petitioner plainly would have been entitled to a copy of the entire transcript, not only that portion which involved him. See, *In re Yamashita*, 327 U. S. 1, 9; *In re Grimley*, 137 U. S. 147, 150; *Dynes v. Hoover*, 20 How. (U. S.) 65, 81; *Hiatt v. Brown*, 339 U. S. 103, 109; *United States v. Praeger*, 149 Fed. 474 (D. C. W. D. Tex.,

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[20]The Court of Appeals below held that the "instruction given went beyond the required limits in presenting the theory of defendant" (App. A, p. 10), overlooking that the instruction was over petitioner's objections and in accordance with the law as stated by the prosecution in its summation to the jury.

1907). Petitioner also declined to answer inquiries by invoking the privilege against self-incrimination. Clearly he was justified in believing that he was entitled to receive the entire transcript of the proceedings in order to establish the "setting" which gave rise to his fears of prosecution. *Hoffman v. United States,* 341 U. S. 479, 487-490. Other grounds for declining to answer the inquiries were equally dependent upon an examination of the entire proceedings.[21]

The short of the matter is that petitioner was deprived of the opportunity in law and in fact from proving to the jury that he was innocent of the charges made against him, that he had no reason or motive for conspiring to receive, or receive, a purloined copy of the transcript of the proceedings in which he was involved. The result was obtained by ruling contrary to the decision of this Court in *Morissette* and the decisions of other Courts of Appeal in the same manner, and by a disregard and misconstruction of the Uniform Code of Military Justice, the rules and regulations thereunder, and the applicable military and civil law. The issues thus raised loom large in the administration of federal criminal justice and military justice and should be reviewed and settled by this Court.

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[21]Indeed, in the subsequent contempt trial these issues were raised and the trial court ordered that the complete record be made available to petitioner throughout the trial and for his inspection. Record on appeal in *Shibley v. United States* in the Court of Appeals for the Ninth Circuit, p. 274, No. 14464.

B.

The Court below has so far sanctioned a departure from the accepted and usual course of judicial proceedings by the trial court herein as to call for an exercise of this Court's power of supervision.

II.

Failure to Grant a Motion for New Trial After an Undenied Showing That the Prosecution Had Suppressed the Evidence of an Essential Witness and That the Newly Discovered Evidence Clearly Exculpated the Petitioner Was a Denial of Justice, a Manifest Abuse of Discretion and a Deprivation of Petitioner's Liberty Without Due Process of Law in Violation of the Constitution.

The Court of Appeals below appears to have deemed the denial of a motion for a new trial on the basis of newly discovered evidence solely a matter for the trial court's discretion. Such a restrictive standard, in the light of the record here, appears contrary to the ruling of this Court in *Griffin v. United States,* 336 U. S. 704, and in conflict with the decisions of other Courts of Appeal on the same matter. *Benton v. United States,* 188 F. 2d 625 (C. A. D. C., 1951); *Coates v. United States,* 174 F. 2d 959 (C. A. D. C., 1949); *Arbuckle v. United States,* 146 F. 2d 657 (C. A. D. C., 1944); *Hamilton v. United States,* 140 F. 2d 679 (C. A. D. C., 1944); *Pettine v. Territory of New Mexico,* 201 Fed. 489 (C. A. 8, 1912).

This Court held in *Griffin* that as a matter of due process of law and fundamental fairness in the administration of justice, the denial of a motion for a new trial on the basis of newly discovered evidence cannot solely be a matter for the trial court's discretion. In remanding the case to the Court of Appeals for reconsideration, this

Court held that if the newly discovered evidence was admissible, the fair test was "whether it would not be too dogmatic, on the basis of mere speculation, for any court to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it" (p. 709).

Moreover, as pointed out in *Benton v. United States*, this case contains special factors, which are adequate to bring the case within the broad provisions of Rule 33 of the Federal Rules of Criminal Procedure, 18 U. S. C., providing for the grant of a new trial "if required in the interest of justice." As Judge Fahy stated in *Benton:* "The provisions of Rule 33, permitting a new trial if required in the interest of justice, though temperately to be utilized, is broader in scope than the limitations which have been held applicable where the motion is based on newly discovered evidence." (p. 627).

What is involved here is not only a motion for a new trial based upon newly discovered evidence which completely exculpated petitioner, but a claim that the prosecution suppressed and concealed the exculpating testimony of the essential witness from petitioner and his counsel, as well as the trial court itself. On remand to the Court of Appeals in the *Griffin* case, that court in reversing and ordering a new trial, stated:

> ". . . the case emphasizes the necessity of disclosure by the prosecution of evidence that may reasonably be considered admissible and useful to the defense. When there is substantial room for doubt, the prosecution is not to decide for the court what is admissible or for the defense what is useful." *Griffin v. United States*, 183 F. 2d 990, 993 (C. A. D. C., 1950).

Where it is shown that prosecuting authorities have deliberately suppressed evidence favorable to an accused, or knowingly used perjurious testimony to obtain a conviction, a new trial must be granted because the constitutional mandate of due process of law and the fair administration of justice require it. *Pyle v. Kansas,* 317 U. S. 213; *Mooney v. Holohan,* 294 U. S. 103; *Cf., Communist Party v. Subversive Activities Control Board,* ..... U. S. ....., 76 S. Ct. 663. See also, *Berger v. United States,* 295 U. S. 78, 88; *McNabb v. United States,* 318 U. S. 332.

The uncontradicted record in this case required a grant of petitioner's motion for a new trial. The trial was a short one, less than five days from *voir dire* to verdict. The evidence against petitioner in support of the charges contained in the indictment came virtually entirely from a single witness, the alleged "co-conspirator and chief actor," whose testimony "was necessary to give continuity to the circumstances and was the sole support of a considerable portion of the case for the prosecution." (App. A, p. 6).

Opposed to the testimony of this disreputable witness was the testimony of petitioner, a reputable member of the Bar for two decades with unblemished character, a disabled war veteran [C. Tr. 24], and a man whose family life and position in the community were exemplary. Petitioner denied that he had committed the offense, and maintained that he had no reason or motive for committing the offense. His position was that his accuser had adopted the fantastic and impossible idea of stealing the transcript of the proceedings in which Thompson knew petitioner was involved, of attempting with a former investigator of a newspaper columnist, Thompson's roommate, to turn Thompson's action into a profit by mailing, registered return receipt, the copies of the transcript to

interested persons. The petitioner claimed that it was impossible to conceive that he would have been a party to such a bizarre overt machination, and that Thompson had finally agreed to testify against petitioner when it became clear that he, along with his roommate and the corporal, would all obtain absolution if the blame were fixed upon counsel.

It is in this context that the newly discovered evidence of Yvonne Fuller should be considered. Her testimony was of such personal nature and so related as to time and detail, that only she could know them; no one could have furnished the details to which she swore, and she related them before unimpeachable witnesses and under circumstances free from duress [C. Tr. 137-8]. Her testimony demonstrated that petitioner had been subjected to a patent frame-up.

The Court of Appeals below held that the testimony of this witness "could not be 'of such a nature that it probably would produce an acquittal'." (App. A. p. 8.) Clearly, this was a gross abuse of discretion and contrary to "the interests of justice." Nor can it be denied under the *Griffin* test that it was "too dogmatic, on the basis of mere speculation," for the court below "to conclude that the jury would not have attached significance to the evidence favorable to the defendant had the evidence been before it."

In addition, the United States was in control of this witness before the trial and knew her to be an essential witness. She had given a statement to the Federal agents and told them she had been with Thompson at the motel near the Marine Base on the day when the copy of the transcript was stolen. She told the officers of their meretricious relations. She told the prosecuting official that

she would not testify against petitioner when the prosecutor asked her if she would. All of this was unknown to petitioner and his counsel. She was concealed in the courthouse when the case was actually being tried, the prosecutor trivializing her testimony in the courtroom, stating to court and counsel that "the girl, *whoever she was,* is not on trial and that has no bearing on the issues involved here," and leading petitioner and counsel to believe that the witness would be produced, but that her testimony was so irrelevant that she later was not called at all.

It is submitted that this was deliberate and knowing suppression of essential evidence, fundamentally unfair and unjust, and a denial of due process of law. It was the duty of the prosecutor to bring forward all witnesses and facts to the court's and jury's attention so that a true consideration could be made in the interest of justice.

Berger v. United States, 295 U. S. 78.

The trial court summarily denied the motion for new trial without opinion. The Court of Appeals stated that the affidavit of Yvonne Fuller "apparently corroborated the testimony of Shibley and contradicted that of Thompson in some respect." (App. A, p. 7.) It stated, however, that the initial statement to the Federal agents and a statement obtained by the prosecutor just before the hearing on the motion showed some inconsistencies with Yvonne Fuller's testimony in support of the motion. But what the court overlooked was that neither statement, though varying in some details, purported to contradict Yvonne Fuller's detailed testimony as to her relations

with Thompson and the events which took place between Yvonne and Thompson concerning the appropriation of the copy of the transcript. All of Yvonne Fuller's testimony "corroborated" Thompson's guilt and absolved petitioner. That the jury would have "attached significance" to her testimony cannot be disputed.

The court below doubted that "reasonable diligence" had been employed. Yet, it is uncontradicted that the young girl had only been a maid in petitioner's home for about six months. She left petitioner's home on December 19, 1952 (the day when the copy of the transcript was missed), and at the time of the trial and for almost a year prior thereto the whereabouts of Yvonne Fuller were and had been wholly unknown to petitioner and his counsel [C. Tr. 136-39, 141-3, 145-6]. Neither petitioner nor his counsel had any reason to suppose that the former maid in his home had any knowledge of the facts involved here. The witness was therefore not "available" for any interview as the court below erroneously assumed. Nor does the record support the view that petitioner somehow waived his right to raise the claim of the suppression of the evidence of the witness because "if, as defendant claims, she was possessed of information favorable to his contentions, he should have called her." (App. A, p. 8.) The uncontradicted record shows that the witness was concealed, petitioner and his counsel knew nothing about her familiarity with the facts, and at the trial Thompson described her as a "lady friend" who knew nothing about his activities, and the prosecutor supported this illusion with the statement that "the girl,

whoever she was, is not on trial here." It was only after the verdict was returned, and while petitioner was hospitalized, that Mrs. Shibley was informed by a young man, a friend of Yvonne, who had been out of the State for a long time, that Yvonne might have knowledge of facts beneficial to petitioner [C. Tr. 137]. The motion for a new trial followed promptly thereafter.[22]

This Court, it is respectfully submitted, should review the substantial and important questions here presented. No injury could have come to anyone from giving petitioner the single opportunity he had to completely establish his innocence and expose the scheme contrived against him. The trial had been a short one, and a new trial could have been expeditiously completed. Involved on the motion was not only the claim that the evidence of petitioner's innocence was now clearly established, but that such evidence had been deliberately suppressed by the prosecution. Justice and the appearance of justice in a doubtful and questionable prosecution were involved. If "judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence" (*McNabb v. United States*, 318 U. S. 332), the rulings of the court below should be reviewed to avoid a grave miscarriage of justice reached contrary to constitutional and legal standards.

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[22]Where a lower court has misconceived or overlooked the essential facts in the record, and rendered a decision which results in a gross miscarriage of justice or a subtle erosion of a statutory or legal principle, this Court has not hesitated to grant review. *Remmer v. United States*, 350 U. S. 377; *Chambers v. Florida*, 309 U. S. 227; *Williams v. Kaiser*, 323 U. S. 471; *Baumgartner v. United States*, 322 U. S. 665; Stern & Gressman, *Supreme Court Practice* (2d Ed., 1954), pp. 128-30.

C.

The court below has decided a federal question in a way in conflict with applicable decisions of this Court; has rendered a decision in conflict with the decisions of other Courts of Appeal on the same matter; and so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

Measured by Standards Involving the Constitutional Rights of Citizens and the Rights and Duties of Civilian Counsel, the Evidence Herein Was Neither Competent Nor Substantial to Sufficiently Support the Verdict, and the Judgment of Conviction Thereon Deprived Petitioner of His Liberty Without Due Process of Law.

This Court has stated that "we have never hesitated to examine a record to determine whether there was any competent and substantial evidence fairly tending to support the verdict." *Mortenson v. United States*, 322 U. S. 369, 374. "Particularly is this so where a decision here for review cannot escape broadly social judgments—judgments lying close to opinion regarding the whole nature of our Government and the duties and immunities of citizenship." *Baumgartner v. United States*, 322 U. S. 665, 671.

The aforesaid legal and social questions are conjoined in the case herein. The first factor which should be noted herein is the context in which the case arises. The Court of Appeals below could not fail to notice this element.

> "Shibley, as lawyer, was employed as counsel for one Bennette in a court-martial proceeding. Prior to the termination of the pre-trial investigation therein, and on August 26, 1952, Shibley wrote a letter to the Commandant of the Marine Corps, complain-

> ing of the method by which the court-martial[23] was conducted at El Toro Marine Base. As a result of this incident and in connection therewith, a Court of Inquiry was convened at the Base, at which Shibley was summoned to testify. At these proceedings, Shibley was asked to detail the matters of which he had written the Commandant. He refused upon various grounds, the validity of which are not in question in this appeal. A copy of the official transcript of these proceedings is the subject matter of the crimes herein charged." (App. A, p. 3.)

As the Statement of the Case herein indicates, the aforesaid summary fails to note the bitterness and animosity of the military officials to petitioner, civilian counsel, for his aggressive defense of an enlisted man in the armed forces. Petitioner had a duty to perform and he performed it. He saw his client through to final vindication. He acted with entire devotion to the interest of his client and with a warm zeal not always understood or accepted by military officials accustomed to unquestioned acceptance of their conduct. The Uniform Code of Military Justice was enacted by Congress to meet the "criticism of the justice systems of the Army and Navy." 1950 U. S. Code Cong. Service, p. 2225. Command influence upon the personnel of military courts, and especially upon military counsel, was one of the primary reasons for the enactment of the law. 50 U. S. C. 591, 612, 613. The provisions of the law have nevertheless proved inadequate,

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[23]No court-martial had yet been convened. The complaint was concerning the conduct of the military officials at the Marine Base while petitioner was representing his client in pre-trial investigation proceedings [C. Tr. 19].

still "allowing too much opportunity for the exercise of 'command influence'." Walker, *Military Law* (1954), p. 137. See also, Keefe and Moskin, *Codified Military Injustice* in 35 Cornell L. Q. 151, 158 (1949). While the presence of civilian counsel is therefore of invaluable aid in the protection of the constitutional rights and legal rights under the Uniform Code of Military Justice of members of the armed forces, it cannot be said that military command is enthusiastic about their appearances. See, Everett, *Military Justice in the Armed Forces of the United States* (1956), pp. 149-152. Petitioner's sharp criticism of military officialdom itself on behalf of his client evoked immediate arbitrary reprisal as aforesaid. Thereafter, he was the focus of military attention with the plain purpose of involving him in some punishable offense.

It is in this context, it is respectfully submitted, that the competency and substantiality of the evidence adduced against petitioner should be examined. It is important for the administration of military, as well as civil, justice that a conviction is not reached by insubstantial evidence with a resultant evasion of the principles of an independent Bar and of the rights of persons, and especially enlisted men in the Armed Forces, to the effective and fearless assistance of counsel. *Offutt v. United States*, 348 U. S. 11; *Cammer v. United States*, 350 U. S. 399. Especially is this true when it is considered that petitioner on technical grounds was denied the right to present undenied proof of his innocence and victimization.

The basis for the conviction rests entirely upon the tainted evidence of a single witness, a mental incompetent, a confessed thief, a sexual degenerate, and a person whose sordid self-interest was plain.[24] As was stated by this Court recently in *Gordon v. United States,* 344 U. S. 414, 417: ". . . where, as here, the Government's case may stand or fall on the jury's belief or disbelief of one witness, his credibility is subject to close scrutiny." Moreover, this sole witness as has been noted aforesaid had three times been committed to mental institutions and at the time he testified the witness was an adjudicated

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[24]The Court of Appeals speaks of "corroboration" by the "corporal", the "photographer", the "postal inspector" and "other witnesses" (App. A, p. 4). There was testimony corroborating Thompson's guilt, but none connecting petitioner with the crimes. The corporal testified that he offered to help petitioner, petitioner never asked him to do anything wrong, he never saw petitioner thereafter; only Thompson [R. 56-108]. The photographer proved that Thompson concocted the idea of photographing the transcript, and the photographer never met or spoke to petitioner [R. 381-96]. The postal inspector proved only that Thompson and Fields, his roommate, themselves had mailed the packages registered return receipt [R. 225-28]. Fields did not claim that petitioner either had known of or spoken to him about obtaining a copy of the transcript prior to its disappearance. Thompson alone enlisted Fields' aid [R. 229-40]. Fields' claim that he spoke to petitioner after the records were mailed and that petitioner told him to leave town [R. 369-75] proved to be only the abortive attempt of a confirmed drunkard to fabricate some subsequent link with petitioner. The documents were mailed by Thompson and Fields days before Fields said he spoke to petitioner about the documents being in the mail [R. 225, 279, 263]. Fields never left town, and Thompson never testified that petitioner ever made such a request of him. Marvel Bloomquist, a "lady friend" of Thompson's, did not know petitioner and solely corroborated Thompson's meetings with the corporal [R. 241-45, 376-77].

incompetent, the judgment of incompetency never having been set aside.[25]

Without this single witness, there was not a scintilla of evidence to connect petitioner with the commission of the alleged offenses. Under such circumstances, viewed in the light of the presumption of innocence which accompanied the petitioner and the circumstances of the case, it is submitted, that the evidence was not sufficiently substantial to submit to the jury for its consideration. "If this type of testimony alone and uncorroborated should be held to convict a person of crime beyond a reasonable doubt such ruling would represent a new miiestone in Anglo-American jurisprudence. It would well lead in the direction of a police state in open defiance of the traditional personal safeguards of our federal constitution." *United States v. Haderlein,* 118 Fed. Supp. 346 (D. C. Ill., 1953). See, *Sykes v. United States,* 204 Fed. 909, 913 (C. A. 8, 1913); *Gillette v. United States,* 236 Fed. 215, 219 (C. A. 8, 1916); *Dahly v. United States,* 50 F. 2d 37, 44 (C. A. 8, 1931); *Johnke v. State,* 68 Neb. 154, 182, 104 N. W. 154, 158 (1903). *Cf., Bridges v. Wixon,* 326 U. S. 135, 155-6.

Moreover, the case against petitioner is unique because the internal structure of the evidence of this sole and disreputable witness was so torn apart by the *prosecution's own witnesses* that no reasonable mind could accept such evidence as adequate to support the conclusion reached

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[25]The trial court gave the jury no instruction on the weight and credibility to be given to such witness, despite his manifest duty to do so where the entire prosecution case hinged on this single witness. See, *Screws v. United States,* 325 U. S. 91, 107; *Viereck v. United States,* 318 U. S. 236, 247-8; *Mills v. United States,* 228 F. 2d 645 (C.A.D.C., 1955).

below. *N. L. R. B. v. Columbian Enameling & Stamping Co.*, 306 U. S. 292, 299. Thompson's story rested on the claim that petitioner suddenly conceived the idea of photographing and mailing the copies of the transcript when Thompson showed petitioner a copy of the transcript on Saturday, December 20, and that it was not until Monday, when petitioner's secretary gave Thompson $200 (as allegedly requested by the photographer), that Thompson obtained the photographic copies. It should be noted that the prosecution did not call the photographer and his assistant on his direct case, although they were obviously important witnesses. It was only when the trial court doubted that Thompson's testimony was adequate [R. 174], that the prosecutor belatedly called the photographer and his assistant and these two *prosecution witnesses* testified that Thompson had consulted them prior to December 20 about photographing the transcript, that the sum agreed upon was $150 and that Thompson had paid that amount and taken away the documents [R. 381-99] *on Sunday, when petitioner's office was closed.* Thus, in measuring the substantiality of the case against petitioner, it appears that the prosecution presented evidence by two of its own witnesses that the testimony of the sole witness upon which it relied was a falsification. This is hardly "clear, convincing and unequivocal proof which does not leave the issue in doubt" nor the equivalent criterion, "proof beyond a reasonable doubt." *Klapprott v. United States*, 335 U. S. 601, 612.[26]

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[26]Although petitioner was convicted of unlawfully receiving and arranging to receive the copy of the transcript of proceedings, it is not disputed that he never received such purloined copy. All he was sent through the mail was a photograph of the document alleged in the indictment. See, *United States v. Wainer*, 170 F. 2d 603 (C.A. 7, 1948).

Guilt is not proved by proving the accused innocent, and without substantial and competent evidence fairly establishing the essential ingredients of the offenses charged here, the judgments of conviction should not be permitted to stand if the liberty of petitioner is not to be lost without due process of law. *Hartzel v. United States,* 322 U. S. 680; *United States v. Falcone,* 311 U. S. 205; *United States v. Di Re,* 332 U. S. 581, 593; *United States v. Wainer,* 170 F. 2d 603 (C. A. 7, 1948); *United States v. Silva,* 131 F. 2d 247, 249 (C. A. 2, 1942).

Important questions therefore are presented here which require this Court's determination. It is important that civilian counsel representing personnel in the military courts should not be subjected to fabricated prosecutions for their advocacy on behalf of members of the armed forces or criticism of military officials. Where it is claimed that civilian counsel so circumstanced has committed an offense with respect to the transcript of proceedings in which counsel was involved with the military (a transcript worth less than $100 and for which counsel has been sentenced to three years imprisonment and possible conclusion of his legal career), exacting standards of proof should be formulated by this Court and should be met by substantial evidence in the record. Unless this Court speaks on these issues, there is danger that civilian counsel will either avoid appearances before the military or "bend the knee" with consequent frustration of the clear Congressional purpose in the enactment of the Uniform Code of Military Justice.

D.

The Court below has decided an important question of federal law which has not been, but should be, settled by this Court.

IV.

The Sentence of Three Years Imprisonment Imposed Upon Petitioner on the Conspiracy Count Was Illegal.

The general conspiracy statute, 18 U. S. C. 371, provides that if the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy should not exceed the maximum punishment provided for such misdemeanor.

The jury were instructed to make a specific finding as to the value of the copy of the transcript [R. 493]. The jury found the value of the particular copy of the transcript which was the subject matter of all the counts in the indictment to be less than $100 [C. Tr. 91].

18 U. S. C. 641 provides that if the value of the property does not exceed the sum of $100, the offense is a misdemeanor.

Insofar as Count "Four" of the indictment [C. Tr. 5] charged petitioner with conspiring with Thompson to unlawfully steal and receive the said transcript in violation of 18 U. S. C. 641, it follows that petitioner was only convicted of conspiring to commit a misdemeanor offense when the value of the document was fixed at less than $100 by the jury, and petitioner's sentence could not exceed the maximum sentence of one year on the conspiracy count. 18 U. S. C. 641; 18 U. S. C. 371.

The Court of Appeals below upheld the sentence on the ground that an additional object of the conspiracy as alleged in the indictment was to violate California

Penal Code, Sections 459 and 460. These sections punish as burglary any entry into a dwelling with intent to commit larceny.

This state offense "assimilated" into the federal law (18 U. S. C. 13) was also charged in the Count "One" of the indictment as a substantive charge [C. Tr. 2], it being alleged that Thompson committed the actual burglary and that petitioner "aided and abetted" Thompson. The jury returned no verdict against petitioner on this count [R. 573].[27]

There was no evidence in the record that petitioner conspired with Thompson to enter the Marine Base and commit burglary. The jury apparently could find no evidence that petitioner aided and abetted Thompson's burglary, and without proof of aiding and abetting, there is usually no basis for conviction of participation in a conspiracy. *Young v. United States,* 48 F. 2d 26, 27 (C. A. 5, 1931); *United States v. American Precision Products Corp.,* 115 Fed. Supp. 823, 826 (D. C. N. J., 1953); 11 Am. Jur., Conspiracy, Sec. 4.

Moreover, the only witness as to the alleged conspiracy to commit burglary was Thompson, and the prosecution evidence showed that as to the matter of entering upon

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[27]Petitioner contends that the Assimilative Crimes Statute is unconstitutional and that if, as the courts below have held, the verdict as to Count Four encompassed a conspiracy to violate an "assimilated" California statute, then such verdict, being based upon an unconstitutional enactment, is illegal and must be reversed. See argument addressed to this point, *infra.*

the Marine Base, Thompson kept this a secret. Thompson testified that he spoke to petitioner on December 19 about the transcript (the day it disappeared), and petitioner allegedly asked Thompson only if he thought the transcript could be gotten and if Thompson knew what he was going to do [R. 126]. The corporal testified that he didn't know whether Thompson was going to make a copy of the record or purloin it [R. 75].

There was no evidence in the record, therefore, to justify a finding that petitioner had conspired with Thompson, or aided and abetted Thompson, in the specific commission of a burglary on the Marine Base. The only reasonable conclusion, therefore, is that the jury in its verdict as to Count Four had in mind no more than a conspiracy to receive in violation of 18 U. S. C. 641. If this conclusion, as it appears, is correct then the conviction was only that of conspiring to commit a misdemeanor. The maximum punishment for such offense is only one year. The jurisdiction of the trial court was exceeded and the judgment must, for that reason, be reversed. At least, this Court should settle the federal question involved.

E.

The Court of Appeals has decided a federal question which has not been, but should be, settled by this Court.

V.

18 U. S. C. 13, the Assimilative Crimes Statute, Inherently and as Construed and Applied Herein, Violates the Due Process Provision of the Fifth Amendment, Creates an Unequal Application of the Criminal Laws in the Different States and Territories and Invades the Reserved Powers of the States in Violation of the Tenth Amendment to the Constitution of the United States.

Petitioner was charged in Count Four, the "conspiracy" count of the indictment, with having conspired to violate the acts charged in the other counts. One of these counts charged burglary under the California statutes. While the jury failed to agree on this substantive count and while the prosecution's testimony, taken at its strongest, contains not one scintilla of evidence to the effect that petitioner entered into a conspiracy having burglary as one of its objects, nevertheless it was the view of the courts below that the conviction on the conspiracy count encompassed a conspiracy to violate the California burglary statutes. If the latter view of the courts below be assumed correct, namely, that it is not possible to tell from the verdict on just which alleged act of conspiracy the jury relied, then it must follow that if any portion of the "conspiracy" count be unconstitutional, then the entire judgment as to such count must be reversed. *Stromberg v. California* (1931), 283 U. S. 359.

It is respectfully submitted that the Assimilative Crimes Statute (18 U. S. C. 13), both inherently and as construed and applied in the case herein is unconstitutional in the following respects:

1. By the statute in question, Congress attempted to delegate to the state and territorial legislatures powers which are strictly and exclusively those of the Federal Congress alone. Not only does the statute purport to "assimilate" and incorporate wholly unspecified and unenumerated statutes of state and territorial legislatures already enacted, but the statute prospectively "assimilates" and incorporates acts of state and territorial legislatures not yet in existence. Such a broad, sweeping and all-inclusive delegation of legislative power is unconstitutional. *Wayman v. Southard*, 10 Wheat. 1, 6 U. S. 253; *Union Bridge Co. v. United States*, 204 U. S. 364.

2. Such a statute is violative of the Fifth Amendment to the Constitution of the United States in that it denies due process of law to any person sought to be prosecuted thereunder. The Assimilative Crimes Statutes does not define any crimes whatsoever and does not state what the punishment therefor should be. It fails completely not only to give due notice but any notice whatsoever of the offense or offenses wherewith a person may be charged thereunder or of the punishment to which he may be subjected. All crimes under the laws of the United States must be clearly defined by Congress and the punishments which they carry must be set out therein by Congressional

mandate. Not even Congress has the power to pass on omnibus statute such as the Assimilative Crimes Statute.

More than this, enforcement of the statute in question results in unequal and uneven enforcement of the laws since the "crime" condemned and the punishment therefor varies under the statute from state to state and territory to territory. Thus, what may be a "crime" under the statute as it is sought to be applied to a defendant in California may not be a crime with respect to a person in Arizona or Nevada. An act which may constitute a felony under the statute when it is applied in New York may be a misdemeanor in New Jersey and no crime at all in Arkansas.

3. The statute invades an area of criminal law exclusively reserved to the states under the Tenth Amendment to the Constitution of the United States.

Since it is elementary that the Federal Government is one of enumerated powers and that all powers not granted to it expressly or by necessary implication are denied to it and reserved to the states, it must follow that a statute such as the one here in question is beyond the jurisdiction of Congress and therefore unconstitutional and void. *McCulloch v. Maryland*, 4 Wheat. 316, 4 U. S. (L. Ed.) 579; *Ex parte Curtis*, 106 U. S. 371; *Chinese Exclusion case*, 130 U. S. 581; *In re Neagle*, 135 U. S. 1; *Martin v. Hunter*, 1 Wheat. 304, 4 U. S. (L. Ed.) 97; *Burton v. United States*, 202 U. S. 344.

F.

The courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

VI.

The Conviction of Petitioner Principally Upon the Testimony of an Adjudicated Insane Witness, the Failure of the Court to Instruct the Jury as to the Weight and Credibility to Be Given the Testimony of an Adjudicated Insane Witness, the Coercion of the Jury's Verdict and the Exclusion by the Trial Court of Testimony as to the Reputation of an Adjudicated Insane Witness, Substantially Affected Petitioner's Right to a Fair Trial and Deprived Petitioner of His Liberty Without Due Process of Law.

The errors referred to herein have been previously noted under the different points discussed in the argument above and are not again repeated in additional detail. These errors arose out of the fundmental misconception of the applicable law by the courts below and in their cumulative effect operated to deprive petitioner of a fair trial and his liberty without due process of law.

Conclusion.

For each and all of the foregoing reasons, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

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